

A "retailer maintaining a place of business in Illinois" as described in 86 Ill. Adm. Code 150.201(i) is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. (This is a GIL).

December 29, 1999

Dear Xxxxx:

This letter is in response to your letter dated November 19, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

This letter is to request a written opinion on the situations described below:

COMPANY's sole location is in CITY/STATE. It has no salesmen outside the state of STATE. **COMPANY** is a third-party vehicle maintenance company that coordinates service to truck fleets and owner-operators whose trucks have experienced emergency breakdowns. From its CITY location **COMPANY** assists in providing vehicle repair and road service from a nationwide network of truck repair vendors. When a breakdown occurs, the customer will call **COMPANY** who arranges with one of the vendors to make the necessary repairs. The service **COMPANY** provides can be simply described in the following example: (1) A vehicle breaks down in Illinois; (2) the driver/owner of that vehicle calls the **COMPANY** office in STATE; (3) **COMPANY** arranges with a vendor in the area of the breakdown for the necessary repair and/or maintenance of the vehicle; (4) the vendor/repairer bills **COMPANY**. **COMPANY** pays the vendor and, in turn, bills the driver/owner.

I would like to request determinations on the handling of sales tax in two circumstances: (1) one in which the driver/owner (**COMPANY's** customer) is subject to Illinois sales tax; and (2) one in which the driver/owner is sales tax exempt.

On the face of it, it would seem that the simplest solution would be to require **COMPANY** to register with the state of Illinois to collect and remit sales taxes. But two circumstances seem to render this solution impractical: (1) **COMPANY** has no 'nexus' in the state of

Illinois; (2) the administrative costs of being required to file a number of 'no activity' sales tax reports on a frequent basis would seem unnecessary and wasteful to the resources of both **COMPANY** and the state of Illinois. In addition, the vendor/repairer collects and remits the tax (including any applicable local tax) to the state of Illinois.

Thus, in the circumstance of a taxable customer, it would seem that perhaps the best solution would be for the vendor/repairer to charge sales tax to **COMPANY** and for **COMPANY** to in turn pass the tax on to the driver/owner. But this gives rise to the other question:

In the second circumstance, if the driver/owner is 'sales tax exempt', could an 'exemption certificate' properly executed by the driver/owner flow through **COMPANY** to the vendor/repairer, thus exempting **COMPANY** as well? This option recognizes the fact that while **COMPANY** is not registered to do business in Illinois, it is essentially 'reselling' its product.

We would appreciate a prompt consideration in order to comply fully with Illinois Sales Tax requirements.

If I can do anything further to bring this matter to a swift conclusion, please do not hesitate to contact at the address or telephone number shown below.

In the context of a General Information Letter, the Department is unable to make nexus determinations because the amount of information required to make that determination is often best gathered by an auditor. Without such a determination, the Department is unable to agree with your conclusion that you do not have nexus with Illinois. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

You describe your business as a vehicle maintenance company. We are assuming that you contract with servicemen who perform work pursuant to maintenance agreements you sell. The taxability of maintenance agreements is dependent upon whether the charge for the agreement is included in the selling price of tangible personal property. If the charge for a maintenance agreement is included in the selling price of tangible personal property, that charge is part of the gross receipts of the retail transaction and is subject to Retailers' Occupation Tax liability. No tax is incurred on the maintenance services or parts when the repair or servicing is completed.

If maintenance agreements are sold separately from tangible personal property, the sale of the agreement is not a taxable transaction. However, when maintenance services or parts are provided under the maintenance agreement, the company providing the maintenance or repair will be acting as a service provider under the Service Occupation Tax Act. The Service Occupation Tax Act provides that when a service provider enters into an agreement to provide maintenance services for a particular piece of equipment for a stated period of time at a predetermined fee, the service provider incurs Use Tax based upon its cost price of tangible personal property transferred to the customer incident to the completion of the maintenance service. See 86 Ill. Adm. Code 140.301(b)(3), enclosed.

In your case, it appears that you are not performing the service or

transferring any tangible personal property incident to a sale of service. If this were the case, you would not incur a tax liability. However, the serviceman that you contract with to perform the service will incur an Use Tax liability based upon its cost price of the tangible personal property he transfers incident to his completion of the maintenance service. Servicemen who incur a Use Tax liability are not authorized to collect "tax" from their service customers because they, not their customers, incur the tax liability. However, they may pass the "tax" along in the price they charge for the service they perform.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.